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No. 94-20

In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; and WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation,

Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN McGLENN, NORMAN F. RICHARDSON, Commissioners of the Washington State Wildlife Commission; and the WASHINGTON STATE DEPARTMENT OF WILDLIFE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

A common thread which runs through Respondent's Brief in Opposition is that the emergency regulations adopted by the State of Washington were the product of a magnificent effort to save Washington wildlife from selfish individualism. Even if this sort of revisionist history were accurate, which it is not, it does little to assuage the

constitutional difficulties created by the emergency regulations. The issues presented by this case do not threaten future generations and their ability to enjoy and make use of Washington state's magnificent wildlife; rather, this case is about preserving the rights of all generations – present and future – when they are threatened by expedient rather than reasoned approaches to worthy goals.

The Petition before the Court is not, as Respondents mischaracterize, an invitation to determine whether there were genuine issues of material fact preventing summary judgment. Opp. to Pet. at 9. Rather, *certiorari* is warranted to correct the Ninth Circuit's significant deviation from this Court's Commerce Clause decisions, and to resolve a direct and irreconcilable conflict between two federal circuit courts.

The Ninth Circuit's opinion erroneously creates a Commerce Clause standard which would make irrelevant the question of the degree of the burden imposed by Washington's regulations on interstate commerce. The Ninth Circuit's opinion is directly contrary to, and would vitiate, the Commerce Clause test expressly mandated by this Court.

I. RESPONDENTS' INTERPRETATION OF THE COMMERCE CLAUSE IS CONTRARY TO SUPREME COURT PRECEDENT

The legal standard governing Petitioners' Commerce Clause challenge to Washington's regulations, which ban the importation and ownership of certain animals, can be summarized succinctly. A court must determine whether the regulations discriminate against interstate commerce, either on their face or in practical effect, or whether the regulations regulate evenhandedly, putting only an "incidental burden" on interstate commerce. Pet. at 11. If the regulations regulate evenhandedly, they will be struck down only if the incidental burdens they impose are clearly excessive in relation to the putative local benefits. *Id.* If the regulations are discriminatory, the burden to

show constitutionality shifts to the state, which must show that the regulations advance a legitimate state interest which could not be served as well by available non-discriminatory means.

Nonetheless, Respondents argue that where a regulation regulates evenhandedly, the "incidental burden" (the extent of which the court must assess in comparison to the putative local benefits) refers not to a burden at all, but is rather a question of whether or not the statute "discriminates" against commerce "indirectly." Opp. to Pet. at 11. From this Respondents argue that once a court finds there is not "direct discrimination," but merely an "incidental burden," the extent or amount of the burden is irrelevant, Opp. to Pet. at 12, and thus, the court need not consider whether there are less burdensome alternatives to protect the putative local interest. *Id.* This analysis is not only sophistry, but is directly contradicted by Supreme Court precedent.

Stripped to its essence, what Respondents are trying to do is construct a circular argument in order to read "burden" out of the test, and confine the test solely to the question of discrimination. They concede that a non-discriminatory regulation is unconstitutional if it is excessively burdensome, but then evade the factual issue of whether it is excessively burdensome by arguing the regulation cannot be burdensome if it is non-discriminatory. It is a formulation which would make the commerce clause inapplicable to any regulation that burdened interstate commerce, but is non-discriminatory, and also makes irrelevant any consideration of the extent of the burden in relation to the putative local purpose where the burden was simply incidental.

Respondents' argument ignores this Court's leading Commerce Clause decisions. Petitioners never conceded that Washington's regulations are, in fact non-discriminatory, given the fact that these regulations cut off all

commerce at the state's border.[1] Such laws have been held by this Court to be the hallmark of a discriminatory enactment.[2] However, even if Washington's regulations were non-discriminatory, this Court's Commerce Clause decisions require that any burdens imposed on commerce are still subject to the constitutional requirement that such burdens not be excessive. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Not only is Respondents' formulation directly contrary to this Court's precedents (which expressly holds that non-discriminatory statutes can be an unlawful burden on interstate commerce even if the burdens they impose are "even-handed"), but the Court has expressly directed that an analysis, as to the extent of the burden and the availability of other alternatives, must be performed even where there is no discrimination. Specifically, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), a case which both Respondents and the Ninth Circuit suggest controls this case, Opp. to Pet. at 11, this Court first discussed the standard to be applied to statutes which discriminate against interstate commerce, either in purpose or in practical effect. The Court then held:

> Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must *nevertheless* strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174

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[1] Respondents explicitly acknowledged this fact in the District Court. Pet. at 19. Respondents continue to ignore the significant evidence which taints the alleged putative purpose for the regulations. Such unfair and biased decisionmaking should not be permitted to be cloaked as a "legitimate state interest." Pet. at pp. 15-16.

[2] *See Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Hughes v. Oklahoma*, 411 U.S. 322 (1970). Pet. at 10.

> (1970). Moreover, the *extent of the burden* that will be tolerated will of course depend on the nature of the interest involved, and *on whether it could be promoted as well with a lesser impact on interstate activities.*

449 U.S. at 471 (emphasis added).

In *Clover Leaf*, this Court had before it a Minnesota statute which banned the sale of milk packaged in plastic containers, but which permitted milk to be sold in cartons and bottles. The Court determined that the statute did not discriminate as between interstate and intrastate commerce, but was "even-handed." 449 U.S. 472. According to the Ninth Circuit's formulation of the commerce clause test, the *Clover Leaf* court should have ended the inquiry at this point, but it did not. Instead, the Court went on to analyze, based on a record developed by a trial on the merits, whether or not the burden placed on interstate commerce was "clearly excessive."

This Court first considered, in its review of the facts, whether, and to what extent, the Minnesota statute stopped the interstate movement of milk to customers in Minnesota. After reviewing the record, the Court concluded that the statute did not stop the movement of milk into the state but merely made it "slightly" more inconvenient to sell milk because interstate sellers would have to conform to different packaging requirements. *Id.* at 472. This Court also noted that the statute did not preclude the manufacture or sale of plastic containers in or from Minnesota, because the principal dairy in Minnesota admitted it would continue to sell milk in plastic non-returnable containers to customers in other states. *Id.* at 472, n.16. This Court also considered the question of whether there were any less burdensome means to achieve the environmental objectives demonstrated, as a matter of fact, to underlie the Minnesota statute and concluded there were none. *Id.* at 473-474. *Clover Leaf* is the law of the land. It has not been overruled and the approach it dictates, which requires a weighing and a balancing of local interests and burdens on commerce

even where the burdens imposed by legislation are non-discriminatory, continues to be the approach taken by this Court. The statute at issue in *Clover Leaf* banned imports of milk in plastic containers, but it did not bar milk imports *per se*. The Ninth Circuit upheld the Washington regulatory ban which prohibits importation of certain species no matter how they may be packaged. The Ninth Circuit's opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

II. WASHINGTON'S REGULATIONS EXCESSIVELY BURDEN INTERSTATE COMMERCE BY IGNORING THE AVAILABILITY OF LESS DISCRIMINATORY ALTERNATIVES

The question of whether Washington's regulations are "clearly excessive in relation to the putative local benefits" is "one of degree" requiring a balancing approach, as Respondents themselves concede. Opp. to Pet. at 14. However, contrary to Respondents' assertions, this requires an evidentiary consideration of the factual contentions of the parties. This is precisely the approach this Court has followed in the leading commerce clause cases; typically deciding them on a full record with deference to findings below by triers of fact. Thus, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), *Maine v. Taylor*, 477 U.S. 131 (1985), and *Hughes v. Oklahoma*, 441 U.S. 332 (1979), this Court in each case did its weighing and balancing *only after* the lower court had heard all the evidence and held a trial on the merits. Despite the Ninth Circuit's inappropriate expert credibility determinations, this same procedure should have been followed here. Pet. at 27.

First and foremost, a factual determination should have been made as to the extent of the burden on commerce. Although the Ninth Circuit concluded this burden was apparently irrelevant, it did so in the face of a

substantial record of evidence to the contrary.[3] At a minimum, the Ninth Circuit failed to recognize there were substantial issues of fact regarding the extent of that burden. Pet. at 17.

In order to determine whether or not the burden was excessive in relation to the putative local benefits, the Ninth Circuit also should have determined whether Washington's regulations serve those benefits in a manner which does not put an excessive burden on commerce. As part of its analysis, the Ninth Circuit under the rule of *Clover Leaf*, would have had to consider, and accept as true, Petitioners' evidence demonstrating the availability of less burdensome means to serve the regulations' alleged goals.

Respondents assert that there is a disagreement among experts as to the availability of satisfactory alternatives and that this was enough to defeat the showing required of a plaintiff, citing *Maine v. Taylor*, 477 U.S. 131 (1986). Opp. to Pet. at 14. The Ninth Circuit's reliance on *dicta* in *Maine v. Taylor, supra*, led it to ignore the importance of this Court's other Commerce Clause precedents and Petitioners' evidence that available alternatives to an outright prohibition exist to satisfy the Respondents' alleged concerns. Appendix 21 to Petition for Writ of *Certiorari*.

Furthermore, Respondents argue for an interpretation of *Maine* which significantly departs from this Court's carefully developed precedent. Respondents' assertion is inappropriate on a motion for summary judgment and factually wrong in this case. First, Petitioners

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[3] The Respondents, while conceding that there are issues of fact on the availability of acceptable alternatives, seek to attack Petitioners' experts in a series of mischaracterizations. Opp. to Pet. at 6. However, all of their assertions, in addition to mischaracterizing Petitioners' expert testimony and its conclusion that there are acceptable alternatives, go to the weight and credibility to be accorded Petitioners' expert witness testimony. Such attacks are irrelevant on a motion for summary judgment.

presented an overwhelming amount of *uncontroverted* evidence regarding available alternatives. Second, this Court's ruling in the *Maine* case was made only *after* development of a full-evidentiary record and hearings in which experts were subject to cross-examination. *See* 477 U.S. at 140; *cf., id.* at 143, n.15. No such hearings have been conducted here due to the premature dismissal of this case on the pleadings. Third, although in *Maine* the statute's challenger conceded there were no scientific tests for disease, here Petitioners' experts testified that there are scientifically-recognized tests which are in fact being utilized by Washington for imports of other animals. Moreover, these tests are being effectively used in other states. As the Court said in *Maine*, a state "no longer may be able to justify its import ban" once scientifically-acceptable sampling and inspection procedures are available. 477 U.S. at 147.

The Ninth Circuit disposed of Petitioners' case on the pleadings by making credibility determinations that were not within its power on a motion for summary judgment. Pet. at 27. This Court has never approved summary judgments that rest on credibility determinations.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The Ninth Circuit's brazen departure from this Court's teachings and Fed. R. Civ. P. 56, amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions. The Ninth Circuit's opinion significantly deviates from this Court's decisions and *certiorari* is warranted to correct the Ninth Circuit's divergence.

III. RESPONDENTS IGNORE THE SPLIT BETWEEN TWO CIRCUIT COURTS ON AN ISSUE OF TREMENDOUS CONSTITUTIONAL IMPORTANCE

Respondents' attempt to distinguish *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), is nonsensical. Opp. to Pet. at 12. Respondents ignore a clear split in Commerce Clause interpretation which even the Ninth Circuit recognized. Appendix 10 to Petition for Writ of *Certiorari*. Both the Ninth and Tenth Circuits based their decisions on *Pike v. Bruce Church*, 397 U.S. 137 (1970). The Tenth Circuit held that a District Court in Wyoming failed to consider the availability of the same less burdensome alternatives as those presented in this case. The attempt by Respondents to isolate themselves from deer and elk species which are being sold in interstate commerce is virtually identical to the attempt made by the Wyoming Game and Fish Commission to ban the importation of elk into Wyoming. The Tenth Circuit, in reaching its decision, was compelled to follow twenty years of Supreme Court precedent flowing from the *Pike* analysis. *Dorrance, supra*, at 765 (citation omitted).

However in Petitioners' case, the Ninth Circuit found that unless Petitioners could prove their alternatives could *eliminate* all risk, no balancing would be done and the regulation would be valid. The Ninth Circuit reached this illogical conclusion despite noting that:

> . . . [A]t some point the risks presented by proposed alternatives as compared to challenged regulations would be so small that courts should not give them credence. PNVP has arguably offered evidence that could support a finding that its proposed alternatives would reduce the risks to that point.

Appendix 20 to Petition for Writ of *Certiorari*.

The record in this case does not lend itself to the balancing of interests required in Commerce Clause cases. While the Respondents claim, through affidavits, that there might be a risk to wildlife from deer and elk

farming, Respondents have not produced substantial evidence that the risk is so great that interstate commerce must be halted and an industry closed. As stated in *Industrial Union v. American Petroleum*, 488 U.S. 681 (1980), "Perfect safety is a chimera, regulation must not strangle human activity in the search for the impossible." If Respondents wish to rely on their interest in ecological preservation, they must show that interest, and the infeasibility of other alternatives, with far greater specificity than that which convinced the Ninth Circuit. Mere supposition of environmental harm is not constitutionally permissible. Pet. at 10.

The Ninth Circuit's opinion is in irreconcilable conflict with a decision of the Tenth Circuit and *certiorari* is warranted to resolve this split between the circuits on an issue of constitutional importance.

CONCLUSION

For the foregoing reasons, and those contained in the Petition, a *writ* of *certiorari* should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,

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